BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF ITT RAYONIER, INC., Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 81-101 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal from the denial of Tax Credit Application No. 1609 on the grounds that the application was not timely, came before the Pollution Control Hearings Board, David Akana (presiding), Gayle Rothrock, and Nat Washington, Chairman, at a formal hearing in Lacey on January 29, 1982.

Appellant was represented by its attorney, Linda A. McCorkle; respondent was represented by Patricia A. Hickey, Assistant Attorney General. Olympia court reporters Gene Barker and Betty Koharski recorded the proceedings.

Having heard the testimony, having examined the exhibits, having considered the contentions of the parties; and the Board having received exceptions thereto from respondents; and the Board having issued a proposed order and having considered the exceptions, and having granted them in part and denied them in part, the Board now makes these

FINDINGS OF FACT

I

Appellant ITT Rayonier, Incorporated (ITT) operates a pulp mill at Port Angeles. On April 7, 1971, ITT was issued amended waste discharge permit No. T-2867 (3373) for that plant which required the removal of 85 percent of the spent sulphite liquor (SSL) solids and a recovery furnace capable of incinerating 90 percent of the solids.

II

Final engineering plans (as amended January 5, 1973) were submitted describing the pollution control facility, and expanded to support ITT's then-outstanding pollution control facility tax credit application No. 928. Included in the basic systems were the following major features: 1) brown stock washing and liquor collection system; 2) evaporation system; 3) recovery boiler system; 4) stack gas conditioning system; 5) acid plant additions; 6) SSL lagoon; and 7) site facilities. Tax exemption certificate No. 650 was issued for the facility on January 31, 1973.

The above plans were further supplemented (April 1, 1974) by a report focusing on the proposed SSL Lagoon. ITT described the lagoon as having 2-1/2 days production capacity of SSL. During short outages

of the recovery boiler, SSL stripped of sulfur dioxide (SO_2) would be diverted into the lagoon. As soon as the boiler returned to service, the SSL in the lagoon would be removed. The lagoon was to be normally empty.

III

The pollution control facility for the pulp mill experienced start-up problems. The recovery boiler did not work properly. With the oral concurrence of respondent's responsible employee in late 1974, ITT was allowed to fill the lagoon with unstripped SSL before sewering any excess SSL in order to continue production. Although the exigency has since passed, ITT continued to use the lagoon in the above-described manner without formally modifying its plans with respondent. SSL is no longer sewered, however.

IV

During the summer and fall of 1979, SO_2 levels in excess of both state and federal standards were measured in the Port Angeles area. The state standards exceeded were the SO_2 ambient air standards adopted as chapter 18-56 WAC, filed May 18, 1970. A program to make further inplant changes and to provide for more restrictive limits for certain SO_2 sources was established. A monitoring program was also intitiated.

V

In May of 1980, ITT identified the SSL lagoon as the major contributor to SO_2 exceedences at certain monitors. The source of SO_2 was confirmed, resulting in an agreement between ITT, respondent

department and the U.S. Environmental Protection Agency. The agreement provided, in relevant part, that respondent would issue an order requiring ITT to install a cover on the lagoon. ITT agreed to accept the order and install the cover by August 15, 1981.

VI

On April 16, 1981, respondent issued Order No. DE 81-325 in response to the agreement requiring ITT to 1) submit plans and specifications for a permanent cover for approval by April 30, 1981; 2) complete construction and installation by August 15, 1981; 3) maintain a temporary cover until a permanent cover was installed; and 4) order equipment and installation within 30 days of approval of the plans and specifications.

ITT fully complied with the provisions of Order No. DE 81-325. The permanent cover was installed on June 16, 1981.

VII

Based upon Order No. DE 81-235, ITT applied for air pollution control tax credit (application No. 1609) under chapter 82.34 RCW in March or April, 1981. Respondent declared the application untimely "in view of process modifications which occurred during initial operation of the recovery facilities." Based upon such determination, the Department of Revenue denied the certification. ITT appealed both decisions to this Board and also to the Board of Tax Appeals.

VIII

ITT discounts its SO_2 stripper and vapor recompression chambers as effective means to reduce SO_2 emissions from the lagoon.

Respondent, on the other hand, views the use of the equipment as important to reduce some SO_2 emissions in an infrequently-used lagoon. These factual differences need not be resolved in view of the limited determination made by respondent on application No. 1609.

IX

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board enters these

CONCLUSIONS OF LAW

I

Tax credit and exemption statutes are strictly construed in favor of application of the tax. E.g. International Paper v. Revenue. 92 Wn.2d 277, 279 (1979). The burden of proof to show that a tax credit or exemption should apply is on the appealing party.

II

As relevant to this matter, RCW 82.34.010(5) provided:

> "Certificate" shall mean a pollution control tax exemption and credit certificate for which application has been made not later than December 31, 1969: Provided, That with respect solely to a facility required to be installed in an industrial, manufacturing, waste disposal, utility, or other commercial establishment which is in operation or under construction as of July 30, 1967, such application will be deemed timely made if made within one year after the effective date of specific requirements for such facility promulgated by the appropriate control agency.

An application is timely if made a) by December 31, 1969 or b) within one year after the "effective date" of "specific

requirements...promulgated by the appropriate control agency" for a "facility" required to be installed in an industrial, manufacturing, waste disposal or other commercial establishment "which is in operation or under construction as of July 30, 1967."

The instant application was sent to the Department of Revenue on March 30, 1981. This date is after December 31, 1969, and is not timely unless the proviso applies.

The "effective date" has been deemed to be the compliance schedule date for completion of engineering. International Paper, supra at 279. Order No. 81-325 sets this date on April 30, 1981.

The "specific requirement" has been accepted to be the compliance schedule. International Paper, supra at 279. It could also include a requirement contained in a permit, order, or regulation which applies to a particular industry. WAC 173-24-090(1); -110(2). Respondent's Order No. DE 81-325 includes a "compliance schedule" and is an "order" within the meaning of WAC 173-24-090(1) and -110(2). Under the International Paper case, these requirements apparently can be "promulgated" in a compliance order. 92 Wn.2d at 279-80. Under the facts of this case and pertinent case law, ITT filed its application within one year (April, 1981) after the effective date (April 30, 1981) of the specific requirements promulgated (Order No. DE 81-325) by respondent. Whether it is denominated a "compliance order" or an "enforcement order" is not relevant, unless form governs substance. The application is therefore timely.

III

Respondent has not yet made a determination as to the merits of the application. The matter should therefore be remanded. We observe, however, a procedural area which deserves some inquiry by both parties, and that relates to the initial application. In our view, this area is more relavant to the disposition of this matter than the foregoing, rather technical, discussion.

The "facility", the lagoon cover here, is apparently an air pollution control facility because it reduces or controls industrial waste, SO_2, which if released to the outdoor atmosphere, could cause air pollution. RCW 82.34.010. WAC 173-24-030(4). However, the lagoon itself is not "an industrial, manufacturing, waste disposal, utility or other commercial establishment which is in operation or under construction as of July 30, 1967." Rather, it is either an "establishment" which did not exist in 1967 or a modification to an existing "facility", the lagoon. Technically, ITT cannot be granted a tax credit or exemption for an establishment which did not exist in 1967. On the other hand, if ITT intends to modify an existing facility it may 1) file an application for a new certificate covering the substance of the earlier certificate as modified, or 2) supplement its existing certificate to include the modification. RCW 82.34.080. ITT's application is not clear; respondent's future determination could only reflect that.

IV

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

Respondent Department of Ecology's decision denying air pollution control tax exemption and credit certificate application No. 1609 is reversed and the matter is remanded for further consideration.

DONE this 15th day of April, 1982.

POLLUTION CONTROL HEARINGS BOARD

DAVID AKANA, Lawyer Member

NAT W. WASHINGTON, Chairman

GAYLE ROTHROCK, Vice Chairman

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF ITT RAYONIER INCORPORATED, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY and DEPARTMENT OF REVENUE, Respondents.	PCHB No. 81-101 ORDER GRANTING MOTION TO DISMISS APPEAL OF DEPARTMENT OF REVENUE DECISION; ORDER DENYING MOTION TO DISMISS APPEAL OF DEPARTMENT OF ECOLOGY DECISION

On September 11, 1981, respondent Department of Revenue appeared by Jeffrey D. Goltz, Assistant Attorney General; respondent Department of Ecology appeared by Patricia A. Hickey, Assistant Attorney General, and appellant ITT Rayonier, Inc., appeared by Linda A. McCorkle, its counsel, on respondent's Motion to Dismiss, in Seattle. The Board, David Akana (presiding) and Gayle Rothrock, considered the Memorandum In Support of Motion to Dismiss, Appellant's Objection to Respondents' Motion to Dismiss, and the record and file herein, and makes the following decision.

Respondent Department of Ecology's (DOE) determination on appellant ITT Rayonier, Inc.'s (ITT) application for certification of pollution control facility (No. 1609) was dated May 11, 1981. The determination was addressed to the audit reviewer at the Department of Revenue (DOR) in Olympia, with a copy of the letter sent by certified mail to the resident manager at appellant's address in Port Angeles. Appellant received a copy of DOE's letter on May 13, 1981. By letter dated June 3, 1981, the DOR informed appellant that certification of its application No. 1609 was denied because the facility was not approved by DOE. Appellant received the DOR letter on June 8, 1981, at its Port Angeles office. Appellant mailed its appeal of the decisions to this Board on July 8, 1981. The appeal was received by this Board on July 9, 1981. An appeal was also filed with the Board of Tax Appeals. Respondents moved to dismiss the appeal before this Board on the grounds that the appeal was not timely filed and/or the Board lacks jurisdiction to hear the case.

Jurisdiction - Department of Revenue. The Pollution Control Hearings Board reviews the decisions of the Department of Ecology and air pollution control agencies. RCW 43.21B.010; 43.21B.110. There is no authority for the Board to review decisions of the Department of Revenue. Accordingly, the appeal, as it relates to the Department of Revenue's decision should be dismissed for lack of jurisdiction.

Jurisdiction - Department of Ecology. Under the procedures set forth in chapter 82.34 RCW a person files an application for a

pollution control tax exemption and credit certificate with DOR. The Department of Revenue forwards the application to the appropriate control agency, here, DOE. RCW 82.34.020 and .030. The Department of Ecology makes its determination and notifies DOR of its decision. RCW 82.34.030. Within 30 days DOR issues a certificate based upon the determination of DOE. At the same time that DOR is notified, a copy of the DOE decision is sent to the applicant by certified mail. WAC 173-24-060. An aggrieved applicant may appeal the determination to the Pollution Control Hearings Board no later than 30 days after receipt of that written decision. WAC 173-24-130. RCW 82.34.030 and .110; RCW 43.21B.120 and .230. WAC 371-08-080.

Timeliness of Appeal. An appeal must be filed with the Board within thirty days of the receipt of the decision. RCW 43.21B.230; 43.21B.120. An appeal is not "filed" until it is received by the Board. See Hama Hama Company v. Shoreline Hearings Board, 85 Wn.2d 441, 451-454 (1975). The appeal was filed on July 9, 1981, more than 30 days after appellant's receipt of DOE's May 11, 1981 letter or DOR's June 3, 1981 letter (over which this Board has no jurisdiction to review). To avoid dismissal of its appeal, appellant asserts that a hearing should have been held before DOE, and DOE failed to communicate adequate notice of its final decision.

Necessity of Hearing. RCW 82.34.030 requires DOE to make certain determinations with respect to a pollution control facility. "In making such determination, the appropriate control agency [state air

pollution control board] shall afford to the applicant [ITT] an opportunity for a hearing." RCW 82.34.030.

The powers, duties, and functions of the state air pollution control board were transferred to DOE. RCW 43.21A.060; RCW 70.94.305. The Department of Ecology's functions were, in turn, affected by this Board. RCW 43.21A.250; RCW 43.21B.010 and .110; RCW 70.94.025. This Board was created to conduct administrative contested case hearings, exclusively. RCW 43.21B.120 and .240. ITT Rayonier Inc., v. Hill, 78 Wn.2d 700 (1970). The Board's jurisdiction extends to all decisions of DOE except certain rule making decisions. RCW 43.21B.110. State v Woodward, 84 Wn.2d 329 (1974); ASARCO v. Air Quality Coalition, 92 Wn.2d 685 (1979). See WAC 371-08-005.

The result of the reorganization, as pertinent here, was to provide an applicant an opportunity for a hearing under RCW 82.34.030 before this Board rather than before DOE. The Department of Ecology's determination is not final until the period for appeal has expired. RCW 43.21B.120. Consequently, appellant's contention that a hearing before DOE is required by RCW 82.34.030 before a determination is made is not tenable.

Finality and Notice of Decison. Appellant further contends that DOE's determination, a letter addressed to DOR, did not adequately inform the applicant that it was DOE's final determination.

The May 11, 1981 DOE letter to DOR was a decision or determination appealable to this Board. Such letter constituted DOE's "final

decision" for purposes of appeal because it denied a right or fixed some legal relationship as a consumation of its administrative process. WAC 173-24-130. See Department of Ecology v. Kirkland, 84 Wn.2d 25, 29-30 (1974). The contents of the letter did not amount to adequate notice to ITT of DOE's decision on the application, however. See Bock v. Pilotage Commissioners, 91 Wn.2d 94, 99-100 (1978). The letter does not state it is a final or appealable decision; it is not addressed to the real party in interest, ITT; it does not make the findings required of the appropriate control agency under RCW 82.34.030; it does not inform the applicant of its right for a hearing (RCW 82.34.030), i.e., an appeal to this Board. The failure to provide the foregoing information does not necessarily render the DOE letter inadequate--all parties may have understood the consequences of such a letter. See Bock v Pilotage Commissioners, supra. This does not appear to be the case here, however. The Department of Ecology asserts no substantial prejudice from allowing an appeal of its decision, and we cannot perceive of any. Further, putting the contents of the letter aside, it is not asserted that ITT failed to appeal within a reasonable time after discovering the significance of the DOE letter.

Under the circumstances of this case, appellant was not given adequate information which could give it fair notice that DOE had made

an appealable decision.[1] Accordingly, respondent DOE's motion to dismiss should be denied. Now therefore,

On the basis of the foregoing,

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1. In an earlier case we dismissed on grounds of timeliness, we also observed that it would have been preferable to issue a formal ruling to remove any doubt regarding the significance of DOE's action:

> Although not mentioned by counsel, we believe that DOE can improve on the format of its tax application rulings, or provide a cover letter addressed to the applicant which emphasizes that the attached ruling is a final order subject to further appeal.

Georgia Pacific Corporation v. Department of Ecology, PCHB No. 79-8 (Order Granting Motion to Dismiss, at 3) (1979), rev'd Whatcom County Superior Court No. 57136 (1979).

IT IS ORDERED that

1. The Motion to Dismiss ITT Rayonier Inc.'s appeal of the Department of Revenue decision dated June 3, 1981 is granted.

2. The Motion to Dismiss ITT Rayonier Inc.'s appeal of the Department of Ecology decision dated May 11, 1981 is denied.

DONE this 22nd day of September, 1981.

POLLUTION CONTROL HEARINGS BOARD

David Akana
DAVID AKANA, Member

Gayle Rothrock
GAYLE ROTHROCK, Member